51-17

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-2050

UNITED STATES OF AMERICA,

PETITIONER,

- vs -

LUIS ANTONIO ORTIZ,

RESPONDENT.

MOTION FOR LEAVE TO

PROCEED

IN FORMA PAUPERIS

Pursuant to 18 U.S.C. §3006A(d) (6) and Rule 53 of this Court, the Respondent, Luis Antonio Ortiz, asks leave to proceed in forma pauperis without payment of fees and costs. The Respondent was represented by counsel appointed pursuant to 18 U.S.C. §3006A in the District Court and on appeal to the Ninth Circuit Court of Appeals, and the Government seeks certiorari to review the judgment of the Ninth Circuit.

Respectfully submitted,

DATED: 21 August 1974

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Supreme Court, U.S.
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RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

On 22 July 1974, a Petition for Writ of Certiorari in the above-entitled case was served on counsel for Respondent. Respondent adopts the material set forth in the petition under the headings "Jurisdiction," "Questions Presented," "Statutes and Regulations Involved," and "Statement of Facts" except all references to the Baca hearings. The Solicitor General erred in his statement that the opinion in United States v. Baca, 368 F. Supp. 398 (S.C. Cal.1973) [attached as Petitioner's Appendix C] is the opinion of the District Court. Although Respondent's case was consolidated with Baca before the Honorable Howard B. Turrentine for hearing on the impact of Almeida-Sanchez, the Baca opinion was filed on the day of the trial of Respondent. Here the Honorable Edward J. Schwartz did not rely on the Baca opinion but stated, "I think I'm simply going to make the rule on my own in this particular case with regard to the Almeida-Sanchez question and the validity of the San Clemente check-point." [R.T. 5] In doing so the district judge below noted

that he had not read the Baca opinion of Judge Turrentine and denied the suppression motion independent of any consideration of it. Since the trial court did not read or rely on the Baca opinion, the ruling could in no way approve or ratify that opinion. Without such ratification or adoption, the Baca decision cannot be said to be the opinion of the district court below.

Further, the Ninth Circuit in the instant case did not have the transcripts of the Baca hearings before it nor was the opinion a part of the common law record on appeal.

The Baca decision is currently on appeal before the Ninth Circuit which Court has not yet ruled on Baca or any case where the Baca transcripts were in the record on appeal. However, subsequent decisions of the Ninth Circuit have overruled the holdings in Baca. See, United States v. Bowen, _____ F.2d ___, No. 72-1012 (9th Cir. en banc 9 May 1974) cert. pending [Temecula checkpoint not functional equivalent of the border]; United States v. Morgan, ____ F.2d ___, No. 73-1669 (9th Cir. en banc 9 May 1974) [San Clemente checkpoint not functional equivalent of border]; United States v. Esquer, ____ F.2d _____, No. 74-1110 (9th Cir. 1 July 1974) [Ocotillo temporary checkpoint not functional equivalent of the border].

This Court may be requested to review the Baca opinion in the future. However, the action of the district court in Baca is not final and it would be speculative to review that opinion at this time without the supporting transcripts and record. In light of the foregoing, the Government's attempt to "bootstrap" the Baca record onto this case is inappropriate and should not receive the sanction of this Court.

2. The three Circuit Courts of Appeals which have ruled on warrantless searches conducted without probable cause at checkpoints not the functional equivalents of the border agree that Almeida-Sanchez invalidates such searches. United

States v. Speed, 497 F.2d 546 (5th Cir. 1974); United States v. King, 485 F.2d 353 (10th Cir. 1974); United States v. Maddox, 485 F.2d 361 (10th Cir. 1974); United States v. Bowen, supra, (9th Cir. 9 May 1974). The Government concedes that the search in this case was not conducted at the functional equivalent of the border. [Pet. p.10, fn.8]

The constitutional infirmities found in Almeida-Sanchez are identical to the Fourth Amendment violations occurring at fixed checkpoints not the functional equivalents of the border. The discretion of the Border Patrol is unfettered: the stop and search occur without cause and the intrusiveness of the search and the length of detention depend solely upon the whim of the officer in the field. Absent a warrant authorizing a particular location for checkpoint activities, the movement and location of the checkpoint is at the unbridled discretion of the Border Patrol officers.

The extravagant license to search embodied in 8 U.S.C. § 1357(a)(3) encounters the same constitutional hurdle here as in Almeida-Sanchez. "Automobile or no automobile, there must be probable cause for the search." Almeida-Sanchez v. United States, 413 U.S. 269. This principle is not the invention of an intervening Court, nor is it a new concept. Carroll v. United States, 267 U.S. 132 (1925). This Court stated in Chambers v. Maroney, 399 U.S. 42, 51 (1970): "In enforcing the Fourth Amendment's prohibition against unreasonable searches and seizures, the Court has insisted upon probable cause as a minimum requirement for a reasonable search permitted by the Constitution." It is this resolute approach throughout our history which had led the Fifth, Ninth and Tenth Circuits to agree that a necessary antecedent to a lawful automobile search is probable cause.

Since the Government concedes the search here did not take place at a functional equivalent of the border, it resorts to reliance upon Camara v. Municipal Court, 387 U.S. 528 (1967)

to support the search. Camara held that administrative inspections to enforce community health and welfare regulations could be made with warrants on less than probable cause to believe that particular dwellings were the sites of particular violations. However, Government reliance on Camara was rejected in Almeida-Sanchez and the rejection of this analogy to administrative inspections applies with equal force here. This case is indistinguishable from Almeida-Sanchez save that the automobile search here took place at a fixed checkpoint sixty-six (66) miles north of the border on an interstate freeway between the two largest cities in California. The checkpoint, which is just south of San Clemente, is a road block of all northbound traffic on Interstate highway five. There is no factual distinction of constitutional dimension between the stop and search here and the same causeless stop and search in Almeida-Sanchez. As the Ninth Circuit has stated:

> "The opinion in Almeida-Sanchez, delivered by Mr. Justice Stewart, leaves little doubt that traditional Fourth Amendment standards apply to fixed-checkpoint searches as well as to roving-patrol searches." Bowen, supra, slip opinion at p.3.
>
> "Moreover, the government in Almeida-Sanchez sought to justify roving-patrol searches on the basis of 8 U.S.C. §1357(a)(3) and 8 C.F.R. §287.1(a)(2). Here, the government seeks to justify the fixed checkpoint search by reference to the same statute and regulation. But when the Supreme Court held that this statute and regulation could not exempt searches carried out pursuant to them from traditional Fourth Amendment scrutiny, See 413 U.S. at 272, the government's statutory justification for fixed-checkpoint searches as well as for roving-patrol searches vanished." (Id.)
>
> "Such searches, therefore, must meet constitutional standards regardless of their utility in carrying forward the difficult mission of the Border Patrol." (Id. at 4)
>
> "We hold, then, that fixed-checkpoint searches, like roving-patrol searches, even though conducted within a reasonable distance from the border, are not necessarily exempt from the traditional Fourth Amendment requirement of a warrant or probable cause." (Id. at 6-7)

In United States v. Peltier, ___ F.2d ___, No. 73-2509 (9th Cir. en banc 9 May 1974) cert pending, these principles were repeated:

> "Almeida-Sanchez, by contrast, neither overruled past precedent of the Supreme Court nor disrupted long-accepted practice. Mr. Justice Stewart's opinion for the Court, after reviewing the Court's automobile search decisions, concluded that neither line of authority 'provide[s] any support for the constitutionality of the stop and search in the present case ***.' 413 U.S. at 272. Clearly, then Almeida-Sanchez overruled no earlier Supreme Court precedent; rather, it reaffirmed well-established Fourth Amendment standards dating back to Weeks v. United States, 232 U.S. 383 (1914), and Carroll v. United States, 267 U.S. 132 (1925)." [at 4]

3. The contentions of the Government that Almeida-Sanchez should not be applied to searches conducted at checkpoints not the functional equivalents of the border prior to 9 May 1974, the date of the Ninth Circuit opinion in United States v. Bowen, supra, is untenable. Almeida-Sanchez presents no choice between prospective or retroactive application of new constitutional interpretation but merely reaffirmed the well-established doctrine first enunciated by this Court in Carroll v. United States, 267 U.S. 132 (1925). The Ninth Circuit's departure from that doctrine and its return to it on 9 May 1974 in Bowen raises no retroactivity issue.

To accept the contentions of the Government is to say that the Fifth and Tenth Circuits, which have yet to render opinions similar to Bowen, may delay the application of Almeida-Sanchez and the decisions of this Court going back to the 1925 Carroll decision to the date on which those Circuits render Bowen-type opinions.

The position of the Government that there was no indication prior to Bowen that searches at fixed checkpoints not the functional equivalents of the border were unconstitutional disregards the words of Mr. Chief Justice Taft in the Carroll case:

> "It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search. Travellers may be so stopped in crossing an international boundary.... But those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise." Carroll v. United States, supra, at 154.

Assuming, arguendo, that Carroll failed to provide the necessary indication, the decision of this Court in Almeida-Sanchez made it crystal clear that the Fourth Amendment requirement of probable cause applied to border patrol agents. See, concurring opinion of Mr. Justice Powell:

> "The Court today correctly points out that a warrantless search under the Carroll line of cases must be supported by probable cause in the sense of specific knowledge about a particular automobile." 413 U.S. at 281.

Almeida-Sanchez foreshadowed the Ninth Circuit decision in Bowen. The Bowen Court declined to apply Almeida-Sanchez retroactively only because it had erroneously held that searches at fixed checkpoints were not within the ambit of the Fourth Amendment's probable cause requirement. Recognizing that the Almeida-Sanchez decision enunciated no new constitutional principle, the Ninth Circuit took the position that its prior decisions required that Almeida-Sanchez be given a limited prospective application - only those searches which occurred after the date of Almeida-Sanchez would benefit from the probable cause requirement applied to border patrol agents.

Although Respondent disagrees with the view of the N nth Circuit in refusing to hold the probable cause requirement applicable to all checkpoint searches, that is not an issue here where the search occurred after the decision of this Court in Almeida-Sanchez. The application given Almeida-Sanchez, as to Respondent, is correct and the position of the Government that the search of Respondent's vehicle should be sustained because it occurred prior to 9 May 1974, the date of the Bowen decision, is clearly untenable for the reasons set forth above.

CONCLUSION

It is therefore respectfully submitted that the petition

for writ of certiorari should be denied.

Respectfully submitted,

DATED: 21 August 1974.

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